Nos. 87-1729 and 88-454

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

CAPLIN & DRYSDALE, CHARTERED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

vs.

PETER MONSANTO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND SECOND CIRCUITS

JOINT AND COMBINED AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL NETWORK FOR THE RIGHT TO COUNSEL, THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

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STATEMENT OF INTERESTS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit

corporation with a membership of more than 5,000 lawyers, including citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The NACDL is thus uniquely able to express the concern of criminal defense attorneys and their clients about what it considers to be the unauthorized and unconstitutional use by the Department of Justice of the Comprehensive Forfeiture Act of 1984 to restrain or forfeit assets needed by the accused to retain private counsel of his or her own choosing. The NACDL is concerned that the power claimed by the Department of Justice poses a grave danger to our adversary system of justice. The NACDL has appeared in fee forfeiture cases as amicus curiae

and has provided testimony on that subject to the United States Congress.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members. The New York Civil Liberties Union (NYCLU) and the American Civil Liberties Union of Virginia (ACLU of Virginia) are the state affiliates of the ACLU in the two states in which the present actions arose. The ACLU was founded in 1920 as an organization dedicated to the defense of individual rights. In pursuit of that goal, the ACLU and its state affiliates frequently appear in federal and state courts throughout the country. Among the most fundamental of liberties is the right of an accused to the assistance of counsel, without which the assertion of other constitutional rights by the accused would be rendered virtually meaningless. In the view of ACLU and its state affiliates, the primary and preferred

method of exercising the right to counsel is through the retention of counsel of choice. This fundamental right, so critical to our adversary system, is placed at grave risk by the application of forfeiture statutes to legitimate attorneys' fees.

The National Network for the Right to Counsel (NNRC) is a national organization established in early 1986 to defend the right to counsel against government intrusion and abridgement. The NNRC has filed amicus briefs in fee forfeiture cases and in other cases involving the protection of attorney-client relationships. The NNRC has also co-sponsored conferences on these issues at Harvard Law School and New York University School of Law, attended by members of the bar, the judiciary, law school faculties, state legislatures, and the United States Congress. The NNRC shares the concern of other amici curiae that the burgeoning deployment of forfeiture

statutes by prosecutors to deprive accused persons of assets needed to hire defense counsel threatens basic values of our society and should, therefore, be stopped.

INTRODUCTION TO AND SUMMARY OF ARGUMENT

This point is elemental: The Sixth Amendment guarantee that "the accused shall enjoy the right to have the Assistance of Counsel for his defence" establishes a substantive guarantee prohibiting the Sovereign from using unproven forfeiture allegations to defeat the ability of the accused to employ private counsel of his or her own choosing. The right to use one's own property to hire one's own counsel is the primary and preferred Sixth Amendment right. The trial of John Peter Zenger, which epitomizes that right, was the model our Founding Fathers had in mind.

The Government argues that the right of the accused to be defended by counsel of

his own choosing is such a weak and qualified right that it can be defeated by the simple expedient of seeking to forfeit the assets of the accused. The Government insists that the accused is not prejudiced by its freezing his chosen Champion from appearing, because the Sovereign will select a replacement for him--an appointed counsel.

We answer that freedom to choose one's own advocate is a cherished right, dignified by our history and traditions. The right to counsel of choice protects and promotes a host of values such as the autonomy of the citizen accused; his trust and confidence in defense counsel; salutary participation by the accused in the legal process; a strong and independent adversary system; accuracy in decisionmaking; free expression of advocacy in an important public forum; and public confidence in the fairness and integrity of the criminal

justice system. Thus, the right to hire defense counsel of one's own choosing is distinct and separate from the right to have some lawyer (any lawyer) appointed by the court. Lawyers are not fungible commodities.

No right--not even free speech--is absolute; but it takes an extraordinary, compelling state interest to totally abridge the right to counsel of choice, as the application of the forfeiture provisions would do here. The Government's interest in forfeiture does not suffice, at least where the attorneys' fees involved are legitimate; that interest is fully met by limiting forfeiture to sham or fraudulent transfers to attorneys or others.

The Government's only legitimate interest justifying such forfeiture pursuits is to strip wrongdoers of their ill-gotten gains and their power to commit future crimes. Forfeiture is not sanctioned as a

vehicle for raising revenue to support the Government. Forfeiture is not licensed as a device for shunting skilled but ethical lawyers away from our criminal courtrooms. Accordingly, the Government's proper interest is not frustrated by releasing some of the assets to defense counsel. By "forfeiting" these assets to the lawyer, the accused is separated from his property--whether ill-gotten or otherwise; and the defendant's freedom to have counsel of choice is accommodated. This reconciliation of the Government's interests and the defendant's rights also protects the public interest in preserving an independent private defense bar and safeguarding our adversarial system of justice.

Unless the forfeiture statutes are read to allow this accomodation of the defendant's right to retain counsel, they violate the Sixth Amendment. Alterna-

tively, if the Court is not certain whether Congress really decided to grant Executive Branch prosecutors such awesome, unfettered discretion to aim these statutes at their adversaries, it should hold ultra vires the application of forfeiture authority to legitimate attorneys' fees in criminal cases. Basic principles of statutory construction compel this result. E.g., Thompson v. Oklahoma, 487 U.S.---, 108 S. Ct. 2687, 2706, 101 L.Ed. 2d 702, 728 (1988) (O'Connor, J., concurring); Kent v. Dulles, 357 U.S. 116 (1958); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

We are deeply concerned about the prosecution's trailblazing use of forfeiture to cripple the accused before the trial has even started. Its chief legal theory, the "relation back" doctrine, is argued as if punishment first and trial later were acceptable procedure. United States v. Monsanto, 852 F.2d 1400, 1404 (2d

Cir. 1988) (en banc) (Oakes, J., concurring) (alluding to L. Carroll, Through the Looking Glass and What Alice Found There (1896)). The defendant is presumed guilty. This theory not only "completely begs the question," United States v. Unit No. 7 and Unit No. 8, (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988); by shackling the accused in making his defense, it also threatens to become a self-fulfilling prophecy.

In the short run, the Department of Justice's theory will remove private counsel from many of those cases where their skills are most needed. All prosecutions which can be made into a RICO case. See 18 U.S.C. § 1961(1) (the ever-growing list of RICO predicate crimes). All CCE drug cases. 21 U.S.C. § 848. But the criminal forfeiture amendments do not apply just to CCE drug cases. They apply to all felony drug cases. 21 U.S.C. § 853(a).

In the long run, the DOJ's experiment

threatens to wreck the adversary system of justice. Criminal and civil forfeiture is being urged as the latest answer in the war on crime, and use of forfeiture is rapidly expanding. More forfeiture laws surely will be enacted. Further, if the Government can use forfeiture theory to freeze or seize assets before they are wielded in defense of the accusations or void the payment to counsel after the trial is over, the principle will not stop there. The prosecution may well next claim necessity to seize the defendant's assets so that they will be available to pay fines and make restitution. Given the 1984 burst in the size of federal felony fines to $250,000 per count for individuals, 18 U.S.C. § 3571(b), and the authorization of alternative fines based on pecuniary gain to the defendant or loss to the victim, doubled, 18 U.S.C. § 3571(d), few accused persons will be able to enjoy the assis-

tance of retained counsel. Given the penchant of the States to follow the Federal example, all these pernicious practices will spread. Eventually, they will be ubiquitous. The power to accuse will entail the power to paralyze the financial resources of the defendant and--for the crucial practical purpose of defending against the accusations--to render the defendant a pauper at the bar of justice. Then, we fear, the prosecution will be able to exclude private counsel for almost any person accused of any felony in any court. When that day arrives, we will have nationalized the Sixth Amendment and socialized the criminal defense practice. No wonder the American Bar Association, present amici curiae and most of the legal community are so alarmed. If we do not want to see that day, the Government's experiment must be stopped here and now.

We do not rely upon rhetoric. An

overwhelming body of law and logic repel the Government's onslaught.

ARGUMENT

I. APPLICATION OF FORFEITURE PROVISIONS TO LEGITIMATE ATTORNEYS' FEES UNCONSTITUTIONALLY INFRINGES ON THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE AND THREATENS TO UNDERMINE THE ADVERSARY SYSTEM OF JUSTICE

A. The Fundamental Right to Counsel of Choice

Although like many fundamental constitutional rights, the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it, the right is unquestionably an "essential component" or "essential element" of the Sixth Amendment. E.g., United States v. Phillips, 699 F.2d 798, 801 (6th Cir. 1983), rev'd on other grounds, 733 F.2d 422 (6th Cir. 1984) (en banc). Moreover, although the right to appointed counsel is now recognized, Gideon

v. Wainwright, 372 U.S. 335 (1963), the right to counsel of choice was the primary right the Sixth Amendment was designed to protect. This is revealed by an examination of the historical origins of the Amendment, and of the most celebrated trial of the colonial period, the trial of John Peter Zenger, which stands as a vindication of the right to retain counsel of choice and an early demonstration of the importance of that right.

In essence, the Sixth Amendment was a reaction against the prior English practice which prohibited counsel in serious criminal cases. The defendant was required to "appear before the court in his own person and conduct his own cause in his own words." Faretta v. California, 422 U.S. 806, 823 (1975) (quoting 1 F. Pollock & F. Maitland, The History of the English Law 211 (2d ed. 1898)); Argersinger v. Hamlin, 407 U.S. 25, 30 (1972); Betts v. Brady,

316 U.S. 455, 466 (1942); Powell v. Alabama, 287 U.S. 45, 60 (1932); W. Beaney, The Right to Counsel in American Courts 8-10 (1955). The English common law practice of prohibiting a defendant from being represented by counsel in felony and treason cases was "so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers." Powell, 287 U.S. at 60.

The English rule was clearly rejected by the colonies even before adoption of the federal Constitution. See Holden v. Hardy, 169 U.S. 366, 386 (1898) ("to the credit of [England's] American colonies let it be said, that so oppressive a doctrine had never obtained a foothold there."). Thus, at the time of the adoption of the federal Constitution, the constitutions of the states guaranteed "that a defendant is not

to be denied the privilege of representation by counsel of his choice." Betts, 316 U.S. at 468. It was protection of the right to counsel of choice that the Sixth Amendment contemplated when it guaranteed the right of the accused "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. By rejecting the English practice that had denied the accused the right to appear through counsel in felony and treason cases, "[t]he Sixth Amendment extended the right to counsel beyond its common law dimensions." Argersinger, 407 U.S. at 30. The Amendment was not, however, regarded as providing a right to appointed counsel. Bute v. Illinois, 333 U.S. 640, 660-66 (1948); W. Beaney, supra, at 28-29. The right to counsel it protected was "the right to retain counsel of one's own choice and at one's own expense." Id. at 21; see Bute at 661. 3 J. Story, Commentaries on the Constitution

606 (1833) (the "right to have . . . counsel employed for the prisoner").

Moreover, the colonists would have been surprised, to say the least, at the notion that a defendant could be deprived of the right to retain his own counsel and ordered to stand trial instead with counsel selected by the court. The most famous trial of the colonial era, one that had a profound effect on the Framers--the trial of printer John Peter Zenger--stands as a vindication of the right to appear through chosen counsel rather than one appointed by the court.*

Zenger was tried in the colony of New York in 1735 for seditious libel based on his printing a newspaper critical of the Governor of the colony, the tyrant William Cosby. See generally J. Alexander, A Brief Narrative of the Case and Trial of John

*To our knowledge, the Zenger trial has not been brought to the attention of any court in any previous fee forfeiture litigation which has reached judgment.

Peter Zenger, Printer of the New York Weekly Journal (S. Katz ed. 2d ed. 1972) (hereinafter cited as "Katz"); The Trial of Peter Zenger (V. Buranelli ed. 1957); L. Rutherfurd, John Peter Zenger: His Press, His Trial and a Bibliography of Zenger's Imprints (1904). Two noted New York lawyers who had been leaders in the political movement opposing Cosby, James Alexander and William Smith, came to Zenger's defense. Judge James DeLancey, a Cosby lieutenant appointed by the Governor as Chief Justice of the New York Supreme Court, presided at the trial. He rebuffed the lawyers' attempts to win Zenger's release and set an excessive bail. When the defense attorneys challenged DeLancey's authority to act as judge, DeLancey responded by disbarring them. This unprecedented order disbarring Alexander and Smith was a partisan "tactic to deprive Zenger of competent legal counsel, since

there were few lawyers in New York at the time and probably none so skilled as Smith and Alexander." Katz, supra, at 21.

Following the disbarment of his attorneys, Zenger, without funds, immediately petitioned the court for appointment of counsel. DeLancey obliged him by appointing John Chambers, "a competent lawyer but a Governor's man." Katz, supra, at 21. Zenger's allies were concerned, and Alexander and Smith began to look for another lawyer to try the case. Alexander, although disbarred, had continued to work on the case, and developed a more daring strategy than the conventional one conceived by Chambers. The plan was to base Zenger's defense on the truth of the newspaper articles, trying Cosby in the process, and on that basis to seek a jury acquittal on the libel charges. Alexander engaged Andrew Hamilton, a distinguished attorney from the neighboring colony of

Pennsylvania, to execute the defense plan.

Hamilton took over the defense following Chambers' opening statement and made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing truth. Admitting that Zenger had published the statements in question, he asserted that the printer could not, however, be convicted of libel for printing the truth. Judge DeLancey instructed the jury that it was to determine only whether Zenger had published the statements, leaving the law of libel to the court. But the jury acquitted Zenger.

Had Judge DeLancey prohibited Zenger's representation by counsel of choice and insisted on Zenger appearing through the young court-appointed lawyer, an important chapter in American history would have been different. The trial of John Peter Zenger played a significant role in establishing the American tradition of an independent

criminal defense bar serving as a meaningful check against a partisan or corrupt judge or prosecutor. The Zenger trial and the importance of the right to representation by counsel of choice were fresh in the minds of the Framers when they drafted the Sixth Amendment.

Long before it was regarded as a source for the right to appointed counsel, the Sixth Amendment thus guaranteed the fundamental right to retain counsel of choice. Indeed, when this Court in 1932 first recognized a qualified right to appointment of counsel in capital cases as a matter of due process, it referred to it as "a logical corollary from the constitutional right to be heard by counsel." Powell, 287 U.S. at 72. And in 1942 in discussing the right to self-representation the Court referred to the Sixth Amendment as embodying "the correlative right to dispense with a lawyer's help." Adams

v. United States ex rel. McCann, 317 U.S. 269, 279 (1942), cited with approval in Faretta, 422 U.S. at 815. If the right to appointment of counsel and the right to self-representation are "corollaries," then the right to be heard by counsel of choice must be the primary right.

This basic component of the constitutional right to counsel is separate and distinct from the right to appointed counsel, which it significantly predated. The right to counsel "includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to 'a fair opportunity to secure counsel of his own choice.'" Crooker v. California, 357 U.S. 433, 439 (1958). "[A] defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." Chandler v. Fretag, 348 U.S. 3, 10 (1954).

B. The Right to Counsel of Choice Is Not Satisfied by Provision of Appointed Counsel

This right to counsel of choice, so dignified by our constitutional history and traditions, would not be satisfied by the provision of appointed counsel, the result that the Government contends will fully meet the requirements of the Sixth Amendment. Even assuming that appointed counsel would provide the effective assistance of counsel mandated by the Sixth Amendment, this contention misconceives the separate and distinct nature of the right to counsel of choice. See United States v. Unit No. 7 and Unit No. 8 (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988) ("[W]e reject the government's argument that even if its action should push Kiser into indigency, the Sixth Amendment would be fully vindicated by offering him appointed counsel . . . . This is an extraordinarily impoverished view of the non-indigent's right. In

essence it collapses the two distinct rights into one, the lesser.").

The "essential aim" of the Sixth Amendment may be, as Mr. Chief Justice Rehnquist recently stated in Wheat v. United States, 486 U.S. ---, 108 S. Ct. 1692, 1697, 100 L.Ed. 2d 140, 148 (1988), "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer who he prefers." But a criminal justice system relying on appointed rather than retained counsel would not be the adversary system contemplated by the Sixth Amendment, no matter how effective such appointed advocates were. Where the Government seeks to deprive a defendant not of a particular preferred counsel, as in Wheat, but of the opportunity to select any counsel, giving him a competent appointed lawyer will not satisfy the principles of the Sixth Amendment.

We believe that the Sixth Amendment right of the accused to hire private counsel promotes transcendent values: free choice or autonomy in a momentous contest between the citizen and the Sovereign; salutary participation in the legal process; and free expression of advocacy in a public forum. As to free choice, in other contexts the federal courts have rejected the contention that deprivation of the right to counsel of choice can somehow be cured by provision of appointed counsel:

> The government argues that Rankin was competently represented by appointed counsel at trial. That, however, is not a relevant consideration. A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice. "Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." Flanagan v. United States, 465 U.S. 259, 268 . . . (1984). In this respect, the denial of one's selected lawyer is quite

> different from a claim of ineffective counsel where a harmless error test is appropriate. The right at stake here is similar to that of self-representation. "The right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 . . . (1984). See also United States v. Laura, 607 F.2d 52, 58 (3d Cir. 1979) (defendant "need not show that the dismissal [of counsel] was prejudicial.").

United States v. Rankin, 779 F.2d 956, 960-61 (3d Cir. 1986). Federal courts have also held that denial of the right to counsel of choice does not require a showing of prejudice. Rather, the right is "so fundamental that any interference cannot be deemed harmless error" and must result in automatic reversal even where the defendant was provided the effective assistance of counsel through appointed counsel. United States v. Romano, 849 F.2d 812, 820 (3d Cir. 1988); accord, United States v. Panzardi Alvarez, 816 F.2d 813, 816 (1st Cir. 1987); Rankin, 779 F.2d at 960-61; Gandy v. Alabama, 569 F.2d 1318, 1323-26 (5th Cir. 1978); Wilson v. Mintzes,

761 F.2d 275, 285-86 (6th Cir. 1985); United States v. Lewis, 759 F.2d 1316, 1326-27 (8th Cir.), cert. denied, 479 U.S. 994 (1985); United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984).

This approach is grounded in recognition that the right to counsel of choice serves substantial interests apart from the general interest in accuracy in adjudication. "[W]ere a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). "[T]he right to counsel of choice, like the right to self-representation, is premised on respect for the individual . . . ." Mintzes, 761 F.2d at 286. See Faretta, 422 U.S. at 835 (recognizing

right of self-representation out of "that respect for the individual which is the lifeblood of the law."). The defendant's basic right to choose the type of defense he wishes to mount also supports the right to select counsel of choice, "[f]or the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979). Moreover, "the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." Id. at 57; ABA Standards for Criminal Justice 4-29 (2d ed. 1980) (commentary) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."). None of these policies underlying the right to

counsel of choice would be satisfied by the right to appointed counsel or by the right to the effective assistance of counsel, "since, unlike the right to counsel of choice, 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" Mintzes, 761 F.2d at 285 (quoting United States v. Cronic, 466 U.S. 648, 658 (1984)).

In this respect, the right to the assistance of counsel of choice is like the right to self-representation, see Rankin, 779 F.2d at 960-61, and like that right, its deprivation cannot be remedied by the provision of appointed counsel, no matter how competent such appointed counsel may be. See Faretta, 422 U.S. at 820 ("To thrust counsel upon the accused against his considered wish,

thus violates the logic of the [Sixth] Amendment"); id. at 833 ("the notion of compulsory counsel was utterly foreign" to the Founders). Without some compelling justification, forcing a public defender or other appointed counsel on a defendant otherwise able to hire his own counsel and desiring to do so thus would infringe the Sixth Amendment. Requiring such an unwanted counsel instead of the counsel of defendant's choice would be as offensive to the Sixth Amendment as insisting on unwanted counsel when defendant's choice is self-representation. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not his defense." Faretta, 422 U.S. at 821 (emphasis by the Court).

Allowing the defendant to select his own counsel honors his right to free choice and autonomy in a matter of vital concern to him, see Faretta, 422 U.S. at 806-07 ("those who wrote the Bill of Rights . . . understood the inestimable worth of free choice."), and best effectuates the values underlying the right to counsel by maximizing the trust and confidence between client and attorney that are preconditions to its successful exercise.

Permitting the accused to select his own counsel also promotes his interest in having assistance independent of the Sovereign which is prosecuting him and judging him. It further promotes the public interest in preserving an independent private criminal defense bar. In our system of justice it is essential that judges be independent, see The Federalist No. 78 (Hamilton), in The Federalist Papers 226 (R. Fairfield ed. 1961), that juries be

more independent, see Duncan v. Louisiana, 391 U.S. 145, 155-56, (1968), and that defense counsel be most independent.

On the other hand, forcing the accused to have lawyers selected, recruited, trained, paid and/or supervised* by the Sovereign defies the value of free choice, jeopardizes independence, and undermines the defendants' trust in the system and their reconciliation with any adverse results of the proceedings. Cf. Polk County v. Dodson, 454 U.S. 312, 325 n.17 (1981) ("Our adversary system functions best when a lawyer enjoys the whole-hearted confidence of his client.") And, in the long run, allowing the prosecution to keep private defense counsel out of major criminal trials will destroy public confidence in the impartiality and integrity of

*The reality, of course, is that many public defender offices and most court appointment systems lack adequate capacity to recruit, train and supervise their lawyers as professionals.

our system of justice.*

Speaking of the public interest, permitting representation through counsel of choice promotes precious values of public advocacy. The use of counsel by a criminal defendant to assert rights on his behalf is protected by the First Amendment "right to hire attorneys on a salary basis to assist . . . in the assertion of . . . legal rights." See, e.g., United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967); accord, Matter of Abrams, 62 N.Y.2d 183, 196, 476 N.Y.S.2d 494, 500-01, 405 N.E.2d 1, 7 (1984) (First Amendment protects criminal defendant's

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*We are also concerned about the terrible ethical problems unleashed by the prosecution's use of the forfeiture statutes to pursue assets the accused needs to hire private defense counsel. Application of the forfeiture statutes to legitimate attorneys' fees would totally destroy the right to counsel of choice by rendering private counsel financially and ethically unable to represent clients in such cases. These considerations are ably presented in the Brief Amicus Curiae of the American Bar Association in Support of the Petitioner Caplin & Drysdale in No. 87-1729 and the Respondent Monsanto in No. 88-454, so we need say no more.

right to counsel of choice). Moreover, what is said in the courtroom--as public a forum as there is, see, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) --is a matter of vital First Amendment concern. From the John Peter Zenger trial to this very day, who appears in court and what he or she advocates there makes an enormous difference to the justice system and to our entire society. By keeping any advocate chosen by the accused from ever entering the door of the courtroom, the Government's actions have barred from this marketplace of ideas the communications of the defendant--the object of the controversy--in the form and by the advocate he has chosen to make them. Instead of the free market of ideas that the right to counsel of choice best promotes, the Government would substitute the public monopoly of appointed counsel. Restricting this vital forum to public defenders or

court-appointed lawyers would be analagous to permitting newspapers to report whatever a political candidate wished to communicate to the public, but requiring that all reporters be either government employees or free-lance reporters selected by the government and paid at substantially below market rates. Our traditions of free choice, free enterprise and free speech prohibit restricting expression or advocacy to such state-controlled channels.

In sum, a defendant's Sixth Amendment rights may be exercised in one of three ways--he may choose a private counsel, the court may appoint an attorney for him, or he may decline counsel and represent himself. Of the three, the first is the primary method; it is the one envisioned by the Framers of the Sixth Amendment and the one with the longest history of constitutional recognition. Moreover, of the

three, it is the preferred method; neither appointed counsel nor self-representation conform as closely to our model of the adversary system, see Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."), nor do they effectuate as well the goals of promoting accuracy, fairness, and public acceptance of the criminal justice process that the Sixth Amendment seeks to serve.

C. Deprivation of the Right to Counsel of Choice Requires Compelling Justification

The discussion above demonstrates that the right to counsel of choice is a fundamental right. It cannot be denied without compelling justification. United States v. Monsanto, 852 F.2d 1400, 1402 (2d Cir. 1988) (Chief Judge Feinberg, writing

for himself and Judges Oakes and Kearse).

It is no answer that a defendant denied this right may receive appointed counsel conforming to the "effective assistance of counsel" standard. Moreover, the fact that the right to choose counsel is available only to those with sufficient resources to exercise the right does not justify the Government depriving the defendant of the resources that he would otherwise possess and that are ample to exercise the right. United States v. Unit No. 7 and Unit No. 8 (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988). Virtually all constitutional rights cost money to exercise. The right to free speech is dependent upon the individual's having sufficient resources to reach his audience. A listener's First Amendment right to receive ideas is similarly dependent upon his ability to travel to a demonstration, purchase a book, pamphlet or newspaper, or own a television.

A pregnant woman's right to choose an abortion is contingent on her having the resources to afford one. Even the free exercise of religion usually costs money. Where independent of governmental action, an individual lacks the resources to exercise these fundamental rights, the absence of state action will ordinarily preclude his assertion of a constitutional claim. On the other hand, where the individual would otherwise have sufficient resources to exercise the right, but Government acts in some way to take away those resources, the governmental action in question must be justified. Kiser, 853 F.2d at 1450-51.

Few constitutional rights, including the right to counsel of choice, are absolute. See Wheat v. United States, 486 U.S. ---, 108 S. Ct. 1692, 1697, 100 L.Ed. 2d 140, 148-49 (1988) ("The Sixth Amendment right to choose one's own counsel

is circumscribed in several important respects."). Fundamental rights like the First Amendment must yield to governmental regulation advancing a "compelling state interest." See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (First Amendment right to free exercise of religion). Thus, it is no answer that the defendant after forfeiture is left without sufficient assets to retain counsel of choice; rather, the question is whether the Government's freezing or seizing of his assets can be justified when balanced against the significant individual and societal interests underlying the constitutional right to counsel of choice.

In striking this balance a standard of "heightened scrutiny," demanding compelling necessity to outweigh the right to counsel of choice, is appropriate. What is at stake here is no mere regulation of the right or postponement of its exercise, for

which lesser scrutiny may suffice. Rather, what is involved is the wholesale abridgment of the right to counsel of choice. When a defendant is stripped of all his assets, his right to retain counsel of choice is not only postponed or its exercise limited by the need to accommodate the demands of the administration of justice; his ability to exercise the right is totally abridged.

For such a total abridgment to be upheld, the most compelling of justifications is required. The assertion of an important or significant governmental interest cannot alone suffice. This is the teaching of Faretta, which recognized that the Sixth Amendment right of self-representation outweighs a number of significant interests that argue against it--the interest in judicial economy and efficiency that would be furthered by requiring counsel rather than permitting an uncounseled

defendant to conduct the defense, and the societal interests in accuracy in adjudication and the appearance of fairness which inevitably suffer when there is a strong imbalance in the adversary system such as results when an uncounseled defendant alone faces a professional prosecutor. Faretta resolves the conflict between these significant interests and the defendant's Sixth Amendment right in favor of the Sixth Amendment right to self-representation which, like the right to counsel of choice involved here, was at risk of being totally abridged. See Rankin, 779 F.2d at 961; Mirtzes, 761 F.2d at 286.

This Court's recent distinction of the right of self-representation protected in Faretta from the right to choose a particular counsel does not call into question the propriety of applying the strict scrutiny approach of Faretta where, as here, a wholesale abridgement of the right to

choose any counsel is at issue. In a footnote in Wheat, 108 S. Ct. at 1697 n.3, the Court stated: "Our holding in Faretta that a criminal defendant has a Sixth Amendment right to represent himself if he voluntarily elects to do so does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." (Emphasis in original.)

That the "holding" of Faretta does not "encompass" the distinct issue presented in Wheat is, of course, not surprising. Faretta did not deal at all with the right to counsel of choice, but only with the separate question of whether a defendant could waive counsel and represent himself. As a result, its holding unquestionably cannot be said to "encompass" the counsel of choice issue presented in Wheat. For the same reason, the Court's holding in Wheat--that a defendant could not choose

representation by an attorney found to be subject to an actual conflict of interest--does not "encompass" the discrete question of whether the Government may deprive a defendant of the opportunity to select any private counsel, including all private practitioners not subject to disqualifying conditions such as conflicts of interest.

Although neither the holding of Faretta nor that of Wheat "encompasses" this separate question, the approach of Faretta rather than that of Wheat is appropriate to its resolution. In both this context and that of Faretta, denial of the defendant's contention would totally destroy the right in question--self-representation in Faretta and representation by some private counsel of choice here. By contrast, rejection of the defendant's desire in Wheat, to be represented by a particular counsel found to labor under an actual conflict of interest,

still preserves the defendant's opportunity to be represented by a counsel of choice, albeit not his first choice.

Wheat is thus a case involving necessary and reasonable regulation of the exercise of the right to counsel of choice, rather than its total abridgment. The question raised by the forfeiture statutes is not whether exercise of the right to counsel of choice can be regulated, such as by restrictions on the choice of a counsel who is otherwise occupied in order to prevent undue delay, or on the choice of attorneys disqualified by factors such as the conflict of interest in Wheat. Rather, it is whether the right may be totally destroyed by governmental action that renders the defendant completely unable to choose any private counsel. The balance struck in Wheat between the need to preserve the appearance of fairness in the criminal process and to ensure that trials

are conducted within the ethical standards of the profession, on the one hand, and the defendant's interest in choosing a particular counsel, on the other, 108 S. Ct. at 1697-98, concededly comes at the expense of values underlying the right to counsel of choice. But the effect on these values resulting from requiring the defendant to appear through his second choice of attorneys rather than his first must be regarded as marginal. There is a vast difference, however, between overriding a defendant's choice of a particular lawyer and preventing him from employing any lawyer at all. The latter would subvert many important values underlying the Sixth Amendment--diminishing the potential for trust and confidence that are essential to a meaningful attorney-client relationship, depreciating respect for individual choice and autonomy that serve as a basic premise of the right, undermining the defendant's

sense of participation in the proceeding, thereby diminishing its appearance of fairness and his ability to accept its outcome, prohibiting the exercise of free expression through private advocates, and ultimately jeopardizing public confidence in the administration of justice. As a result, the balancing approach employed in Wheat for measuring the effect of the minor regulation on the exercise of the Sixth Amendment right should be rejected here in favor of the more stringent scrutiny of Faretta.

A number of other Supreme Court cases apply the approach taken in Faretta to resolve conflicts between various significant governmental interests and the Sixth Amendment. These cases come out in favor of the Sixth Amendment. In Massiah v. United States, 377 U.S. 201 (1964), United States v. Henry, 447 U.S. 264 (1980), and Maine v. Moulton, 474 U.S. 159 (1985), the

Court found the Sixth Amendment violated when, after adversary proceedings had begun, the state used an undercover agent or informant to obtain inculpatory statements in the absence of counsel. Even though the prosecution had urged that the gathering of such evidence was necessitated by the police "interest in the thorough investigation" of both indicted crimes as well as new ones, Moulton, 474 U.S. at 179, the Court rejected this plainly significant interest, holding that "the Government's investigative powers are limited by the Sixth Amendment rights of the accused." Id. In other words, so strong is the Sixth Amendment that a routine and valuable investigative technique just could not be employed during that crucial period during which a citizen is guaranteed the assistance of counsel.

Geders v. United States, 425 U.S. 80 (1976), also supports application of

strict scrutiny to the abridgment of the right to counsel of choice. In Geders, the prosecution's concededly important interest in preventing the "improper influence on testimony or 'coaching' of a witness," id. at 89, and the needs of the proper administration of justice to allow the trial judge to exercise "substantial control over the proceedings," id. at 87, could not outweigh the defendant's right to consult counsel during an overnight recess in the trial. The conflict between these significant governmental interests and the right to counsel of the defendant "must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." Id. at 91. See also Brooks v. Tennessee, 406 U.S. 605 (1972). Because the Court found that "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of" the practice

followed, id. at 89, that practice violated the Sixth Amendment.

Here we have not merely the 17-hour "barrier between client and counsel" involved in Geders, 425 U.S. at 89, but a total barrier between the defendant and his counsel of choice. Unless that total barrier can be justified by the most compelling of governmental ends and the absence of alternative means of achieving them, this total abridgment of the right to counsel of choice may not be sanctioned.

Strict scrutiny here is also demanded by First Amendment principles, which in the context of the right to use counsel to assert legal rights overlap with those of the Sixth Amendment. Use of the forfeiture statutes to disqualify a defendant's chosen counsel and render unavailable all but public defenders picked and paid for by the Sovereign destroys important First as well

as Sixth Amendment rights, and must meet the "exacting scrutiny" traditionally applied in the First Amendment area. E.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Elrod v. Burns, 427 U.S. 347, 362 (1976). Moreover, the total abridgment of the right to counsel of choice accomplished by an order restraining the defendant's use of his assets to hire any attorney is a form of prior restraint, and as such bears "a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

D. The Governmental Interests Underlying the Forfeiture Statutes Do Not Justify Deprivation of the Right to Counsel of Choice Through Forfeiture of Legitimate Attorneys' Fees

These Sixth Amendment cases (Faretta, Massiah, Henry, Moulton, and Geders) and the First Amendment cases support the view

that the burden of justification required for this total abridgment of the right to counsel of choice should be framed in terms of the usual test of "strict scrutiny" invoked when fundamental constitutional rights are violated, requiring a "compelling governmental interest" and the use of "least restrictive means." See, e.g., Elrod v. Burns, supra (First Amendment right to freedom of expression); Wisconsin v. Yoder, supra (First Amendment right to free exercise of religion); Roe v. Wade, 410 U.S. 113 (1973) (substantive due process right to abortion). But whether the right is viewed as one requiring strict scrutiny or as a right to be free of "unnecessary or arbitrary" interference in the selection of retained counsel, as several of the circuit courts have stated, see, e.g., In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick), 781 F.2d 238, 250 (2d Cir. 1985) (en banc), cert. denied,

475 U.S. 1108 (1986), the standard cannot be met here.

The cases dealing with the right to counsel of choice usually involve questions of continuances to enable the defendant to retain counsel or to substitute new counsel, or to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court. See Wheat, 108 S. Ct. at 1697-99; Morris v. Slappy, 461 U.S. 1, 11-12 (1984); Leis v. Flynt, 439 U.S. 438 (1979). In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick), 781 F.2d 238, 250-51 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986) (citing cases). These involve regulations on exercise of the right, not its total abridgment. Yet even in these contexts the circuit courts have protected the right to counsel of choice from any

"unnecessary or arbitrary" interference, holding that it will give way only when required by the "fair and proper administration of justice." See, e.g., Slotnick, supra, at 250 (quoting United States v. Ostrer, 597 F.2d 337, 341 (2d Cir. 1979)); United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987) (the right "cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice"); United States v. Rankin, 779 F.2d 956, 958 (3d Cir. 1986) (the right "may not be hindered unnecessarily"); United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir.) ("in general, defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice."), cert. denied, 479 U.S. 994 (1985); Linton v. Perini, 656 F.2d 207, 211 (6th Cir. 1981) (defendant may not be denied the right

"arbitrarily and without adequate reason"), cert. denied, 454 U.S. 1162 (1982); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (the "arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel").

Unlike these trial-related instances of balancing the defendant's right to counsel of choice against the demands of the efficient administration of justice, our cases involve governmental action to strip a defendant of all his assets, thereby totally precluding his ability to retain any counsel. If anything, therefore, a higher level of scrutiny should be applied. Plainly, if Congress were to pass a statute depriving all RICO or drug felony defendants of the right to counsel of choice, that statute would be subjected to strict scrutiny and found unconstitutional. Can the same result be achieved by indirection?

The Government's interests underlying the forfeiture statutes do not justify deprivation of counsel of choice. The opening briefs of the parties and other amici curiae correctly identify these interests. Foremost is prevention of "sham" or "fraudulent" transactions improperly transferring assets to "nominees" not operating at "arms' length" with the defendant, in order to evade forfeiture. Ultimately, if the defendant is found guilty, the statutes serve to punish and deter by stripping the defendant of any ill-gotten gains and removing any illicit resources from future use in crime. All of these interests are, as a practical matter, accommodated when the accused must part with his assets to pay legitimate attorneys' fees to defense counsel.

Thus, marginal at best is the Government's legitimate interest in using the forfeiture statutes to freeze or seize

assets which the accused needs in order to defend against the forfeiture charges. But the cost is exorbitant, for it forfeits the rights of the innocent and the guilty alike in order to make sure that the guilty one does not enjoy the small pleasure of having his or her own chosen counsel during the travail. Moreover, the prosecution's deployment of the forfeiture statutes to preclude hiring private counsel tramples upon a host of other values that are fundamental to our Country. Forfeiture of legitimate attorneys' fees is thus an arbitrary and unreasonable intrusion on the defendant's right to counsel of choice and should be held unconstitutional.

On any fair balance, the right to counsel of choice powerfully outweighs the need to prevent the accused from enjoying that right. In final analysis the Government would sacrifice our very history and traditions in order to put a few more

dollars into the federal treasury, like Esau trading his birthright to Jacob for a mess of pottage. See Genesis 25: 29-34.

II. THE FORFEITURE STATUTES DO NOT COVER LEGITIMATE ATTORNEYS' FEES AND SHOULD NOT BE CONSTRUED TO DO SO; IN THE ALTERNATIVE, THE BROAD ASSERTION OF PROSECUTORIAL POWER TO IMPEDE THE ATTORNEY-CLIENT RELATIONSHIP AND IMPAIR THE ADVERSARY SYSTEM THROUGH UNFETTERED DISCRETION TO INVOKE THE FORFEITURE PROVISIONS AGAINST ATTORNEYS' FEES SHOULD BE DEEMED ULTRA VIRES

A. The Statutes Should Be Construed Not to Cover Legitimate Attorneys' Fees

As we have contended in Point I, application of the forfeiture statute to legitimate attorneys' fees violates the Sixth Amendment right to counsel of choice. At the very least, such application raises an extremely serious constitutional question. Need this difficult constitutional question be resolved by this Court?

It is a cardinal principle of statutory construction that, where possible, statutes should be construed to avoid an unconstitutional interpretation. See, e.g., Lowe v. S.E.C., 472 U.S. 181, 190 (1985); Gutknecht v. United States, 396 U.S. 295 (1970); Machinists v. Street, 367 U.S. 740, 749-50 (1961); Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Indeed, the Court has on occasion invoked canon of this statutory construction with special force where the application of the statute in question would raise "serious constitutional problems." DeBartolo Corp. v. Florida Gulf Coast Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979).

The Court's approach in one such case, N.L.R.B. v. Catholic Bishop of Chicago, is highly instructive. The issue in Catholic

Bishop concerned whether the jurisdiction of the National Labor Relations Act extended to teachers in church-operated schools who taught both religious and secular subjects. The statutory definition of "employer" was exceedingly broad, covering "any person acting as an agent of an employer, directly or indirectly," with eight specified exceptions that did not include church-related organizations of any kind. 29 U.S.C. § 152(2); see 440 U.S. at 511 (dissenting opinion of Brennan, J., joined by White, Marshall & Blackmun, J.J.). The Court had previously read the statute as evincing Congress' intent to "vest in the [National Labor Relations] Board the fullest jurisdictional breadth statutorily permissible under the Commerce Clause," N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (emphasis in original), holding employers within the reach of Congress' interstate commerce

power to be covered regardless of the nature of their activity. The Court was worried, however, that applying the statute to church-operated schools would present "a significant risk that the First Amendment [free exercise clause] will be infringed." 440 U.S. at 502; id. at 501-04.

Given this serious constitutional concern, the Court took special care to avoid the constitutional question through statutory construction. Citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), and paraphrasing Chief Justice Marshall, the Court noted that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 440 U.S. at 500. When "serious constitutional questions" would be raised by application of a statute, as the Court found the First Amendment free exercise questions before it to be, the Court defined its mandate as

follows: "we must first identify 'the affirmative intentions of the Congress clearly expressed' before concluding that the Act" applies. 440 U.S. at 500. Accord, DeBartolo Corp., 108 S. Ct. at 1398 (describing the Catholic Bishop approach as the "traditional rule"). Applying this approach, the Court, although admitting that Congress used "very broad terms" in defining the Board's jurisdiction over "employers," 440 U.S. at 504, could nevertheless find "no clear expression" in either the explicit language of the statute or its legislative history "of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Id. Based on the language of the statute and its legislative history, the Court found that there was "nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction" and "that Congress

simply gave no consideration to church-operated schools." Id. at 504-05. The Court concluded that "in the absence of a clear expression of Congressional intent to bring teachers in church-operated schools within the juri diction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." Id. at 507.

The "traditional rule followed in Catholic Bishop," see DeBartolo Corp., 108 S. Ct. at 1398, should be applied in construing the forfeiture statutes in view of the "serious constitutional questions" that their application to attorneys' fees raises under the Sixth (and First) Amendments. Applying this approach leads to a similar result as reached in Catholic Bishop. In order to avoid the serious

constitutional difficulties presented by application of the statutes to bona fide attorneys' fees, the forfeiture statutes should be read as applicable only to sham and fraudulent attorneys' fees, and not to legitimate fees that are the product of arms' length arrangements. Several district court opinions have reached this conclusion even without benefit of the Catholic Bishop approach, and we commend them to the Court. See, e.g., United States v. Truglio, 660 F. Supp. 103 (N.D. W.Va. 1987); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986), aff'd on other grounds sub nom. United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986), rev'd on this ground but aff'd on other grounds sub nom. United States v.

Harvey, 814 F.2d 905, 913-18 (4th Cir. 1987); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); see also Monsanto, 852 F.2d at 1405-11 (concurring opinion of Winters, J., joined by Meskill & Newman, J.J.). Contra United States v. Harvey, 814 F.2d 905, 913-18 (4th Cir. 1987), aff'd on this ground but rev'd on other grounds sub nom. In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 641-43 (4th Cir. 1988) (en banc); United States v. Nichols, 841 F.2d 1485, 1491-96 (10th Cir. 1988).

The plain language of the criminal forfeiture statutes does not explicitly provide that attorneys' fees are forfeitble; it provides only for the forfeiture of "any property" obtained as a result of the crime. See 18 U.S.C. §§ 1963(a)(3); 21 U.S.C. §§ 853(a)(1).* "Property" is

*The criminal forfeiture statutes also reach

(Footnote continued on following page)

broadly defined to include "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b); 21 U.S.C. § 853(b). While Congress thus defined the "property" subject to forfeiture in very broad terms, there is no indication in the language of the statute that attorneys' fees were deemed to be covered. Under the approach taken in Catholic Bishop, the broad statutory definition of "property" does not, without a strong manifestation of intent in the legislative history, constitute the

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(Footnote continued from preceeding page)

"any interest the person has acquired or maintained in violation of" RICO, 18 U.S.C. § 1963(a)(1); "any . . . property" used to facilitate commission of a felony drug law violation, 21 U.S.C. § 853(a)(2); and "any . . . interest in" and "any . . . property . . . affording a source of influence over" a criminal enterprise. See 18 U.S.C. 1963(a)(2); 21 U.S.C. § 853(a)(3).

"clear expression of an affirmative intention of Congress," 440 U.S. at 504, necessary to find the statutes applicable to bona fide attorneys' fees.

The statute construed in Catholic Bishop had a very broad provision defining basic coverage and numerous special exceptions. Yet the Court, in effect, carved out another exception for teachers in church schools. The CFA of 1984 has a broad forfeiture provision reaching "any property" and exemptions for owners of superior title and bona fide purchasers. It would be perfectly proper under Catholic Bishop to carve out a further exemption for legitimate attorneys' fees in order to protect the Sixth Amendment. However, it may not be necessary to go that far because of the language employed in the existing provision setting up the exemptions. Let us explain.

B. The Statutes Expressly Direct that Purchasers Be Treated "Reasonably"

The criminal forfeiture statutes provide for a post-conviction hearing at which third parties may challenge a forfeiture judgment concerning property transferred to them, see 18 U.S.C. § 1963 (l), 21 U.S.C. § 853(n), but again do not refer to attorneys' fees. Moreover, the plain language of these provisions leaves ample room for exempting legitimate attorneys' fees from forfeiture.

The Government has insisted in fee forfeiture litigation that the plain language of the statutes covers attorneys' fees because of its general inclusiveness and because the only conceivable statutory exception to forfeiture in these cases is the provision for bona fide purchasers, 18 U.S.C. §§ 1963(c) and 1963(1)(6)(B); 21 U.S.C. §§ 853(c) and 853(n)(6)(B), which attorneys cannot meet. But the Government

overlooks key language of the statutes it relies upon.

Under the CFA a petitioner seeking to amend an order of forfeiture to exempt transferred property therefrom must establish that:

> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

18 U.S.C. § 1963(1)(6)(B) (emphasis added); see also 21 U.S.C. § 853(n)(6)(B). Congress added the underlined language to define the bona fide purchaser ("bfp") exemption it was creating. The added language suggests that purchasers with some cause to believe the property was subject to forfeiture may nonetheless be entitled to relief from forfeiture. Moreover, careful scrutiny of the actual language chosen and comparison with the definitions

of bona fide purchaser used in other statutes reveals a fairly generous exemption.

Congress did not speak of persons who were "without reason to believe" that the property was subject to forfeiture. Compare 18 U.S.C. § 3668(b) ("that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws"); 15 U.S.C. § 714p ("did not know or have reason to know"). It did not even speak of persons who were "without reasonable cause to believe" the property might be forfeited. Cf. 28 U.S.C. § 2465 (existence of "reasonable cause" for a seizure disentitles victorious claimant of property from award of costs, and confers immunity upon the prosecutor and upon the persons who made the seizure). Instead Congress exempted persons who were "reasonably without cause to believe" that the property might be forfeited.

Let us take a formal look at the precise wording of the statute. As a matter of grammar and logic, the word "reasonably" is unnecessary unless it ameliorates the "without cause to believe" phrase that follows it. Furthermore, the choice to locate this "reasonableness" modifier at the beginning of the phrase rather than later as a descriptor of the quantum of "cause" needed to defeat the purchaser's claim (e.g., "without cause reasonably to believe"), tells us that the modifier has a larger purpose than to serve as some standard of proof. The purpose is to introduce a rule of reason into the entire question of forfeiting the interests of those who acquire the defendant's property in good faith.

Further, as a matter of lexicology the term "reasonably" connotes: conduct bounded by reason, e.g., acting in a reasonable manner; a condition which

exists moderately; a proposition which is somewhat or fairly sufficiently true; or that which is rational and sensible, is governed by logic or justice, or is subject to a rule of reason. See II The Compact Edition of the Oxford English Dictionary 2432 (1971); Webster's Third New International Dictionary 1892 (unabridged ed. 1981); The Random House Dictionary of the English Language 1608 (2d ed. unabridged 1987); WordFinder Dictionary Thesaurus* (Model WF-220). The first definition of "reasonably" set forth in the Oxford English Dictionary is "1. According to reason, with good reason, justly, properly." Supra. All these shades of meaning carry the idea of flexibility which the Government insists is lacking from the statutory scheme.

From this perspective and as a matter

*An electronic dictionary-thesaurus compiled for Xerox Corporation and Microlytics, Inc.

of common sense, when Congress exempted persons who were "reasonably without cause to believe" that property might be forfeited it included those persons (such as defense lawyers) whose basis to believe that the property was subject to forfeiture does not amount to reasonable cause for a court to visit the hardship of forfeiture upon them. As Chief Judge Clark of the Fifth Circuit put it, "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services." United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), modified on other grounds, 809 F.2d 249 (5th Cir. 1987).

In short, the plain language of the statute supports our view. It is unreasonable and unjust to forfeit property needed to pay legitimate attorneys' fees merely

because of what the lawyers need to know in order to do their job properly. But, at worst, this statutory language is ambiguous* and authorizes consideration of what we believe is plain legislative history also supporting our contention.

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*We recognize that the Senate Report briefly describes the bfp exemption by paraphrasing it in more traditional syntax than the language actually employed by the Congress:

> where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.

Sen. Rep. No. 225, 98th Cong., 1st Sess. 209 (1983), 1984 U.S. Code Cong. & Admin. News 3182, 3392. This report does not elaborate what the Congress meant by its "reasonably without cause to believe" wording of the bfp provision. Moreover, the report does stress the basic purpose of the 1984 amendment to prevent sham transfers to nominees. Id. n.47. So the statutory language used remains supportive or, at least, ambiguous--and in either event fairly amenable to the interpretation we urge.

C. The Legislative History Evinces No Affirmative Intention, Clearly Expressed, to Interfere with Sixth Amendment Rights

If the forfeiture provisions are ambiguous or, at the least, lack clarity, they absolutely must be construed to avoid constitutional problems. And, in this regard, the statutes certainly cannot be said to evince "the affirmative intention of the Congress clearly expressed," Catholic Bishop, 440 U.S. at 501, that attorneys' fees were covered.

In addition, they must be viewed through the lens of the "rule of lenity". The rule of lenity is as appropriate in the forfeiture context, see United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); United States v. $38,000.000 in U.S. Currency, 816 F.2d 1538, 1547 (11th

Cir. 1987)(same); United States v. One 1976 Ford F-150 Pick-Up Vin F144UB03797, 769 F.2d 525, 527 (8th Cir. 1985) (same), as it is in that of the criminal prohibition. See, e.g., McNally v. United States, 483 U.S. ---, 107 S.Ct. 2875, 97 L.Ed. 2d 292, 302 (1987); Bifulco v. United States, 447 U.S. 381, 387 (1980).*

Because of the lack of clarity in the statutes and the serious constitutional difficulties raised by construing them to cover legitimate attorneys' fees, it is

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*We do not believe that the liberal construction clause contained in the CFA, 21 U.S.C. § 853(o), and in the RICO law ("The provisions of this section shall be liberally construed to effectuate its remedial purposes."), see Russello v. United States, 464 U.S. 16, 27 (1983), can cure the ambiguity here. As the Eighth Circuit has found, "[t]he extent of judicial deference" owed such a clause "stands unclear" in view of the countervailing force of the constitutionally based rule of lenity. United States v. Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). In any case, as we have contended, the "remedial" purpose of the forfeiture provisions can be fully effectuated without construing them to apply to legitimate attorneys' fees. See United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

appropriate to look at the legislative history to determine whether it can provide the needed "affirmative intention . . . clearly expressed." 440 U.S. at 501, 504. See also 2A Sutherland, Statutory Construction § 48.01 (4th ed. 1973); Russello v. United States, 464 U.S. 16, 20 (1983) (a "clearly expressed legislative intent to the contrary" may justify disregarding even unambiguous statutory language); United States v. American Trucking Ass'ns, 310 U.S. 537, 540 (1940) (when plain meaning of a statute has lead to "absurd or futile results" or to "an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.").

Congress, in enacting CFA, intended to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of

third-party transfers prior to conviction. See S. Rep., No. 225, 98th Cong., 1st Sess. 200-01 (1983), 1984 U.S. Code Cong. & Admin. News at 3182, 3383-84. The district court opinions construing the statute not to reach legitimate attorneys' fees concluded that Congress only intended the forfeiture provisions to reach fraudulent third-party transfers, such as "sham" attorneys' fees. See cases cited, supra. The legislative history demonstrates that Congress did not contemplate the application of the statute to legitimate as opposed to fraudulent attorneys' fees. A footnote in a House Report accompanying an earlier draft of the 1984 amendments states that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. No. 845, Part I, 98th Cong., 2d Sess. 19 n.1 (1984). This footnote, in its next sentence, states that "[t]he Committee,

therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." Id. Although some courts have construed this sentence to mean that Congress "simply left the question for the courts," United States v. Nichols, 841 F.2d 1485, 1496 (10th Cir. 1988), a proper reading of the two sentences, in sequence, demonstrates that Congress did not contemplate application of the forfeiture statute to legitimate attorneys' fees. In view of the clear disclaimer in the first sentence that the statute not be read "to interfere with a person's Sixth Amendment right to counsel," it would be unnecessary to resolve the conflict in the district courts concerning the constitutionality of the statute because Congress did not contemplate that the statute would be applied in this way, i.e., Congress expected the

statute to be applied only to sham fees. To apply it to legitimate fees would at least potentially interfere with the right of counsel, which Congress stated it did not intend to do. The use of the word "therefore" in the second sentence makes it plain that Congress was not merely announcing that it was leaving the constitutional question to the courts. The word "therefore" refers back to the first sentence and links Congress' statement that it would not resolve the question with its earlier expressed intent not to interfere with Sixth Amendment rights. Because of this expressed intention it "therefore" would be unnecessary to resolve the question.

The Senate report, in discussing the bona fide purchaser exception to forfeiture, states that "[t]he provision is to be construed to deny relief to third parties acting as nominees of the defendant

or who have knowingly engaged in sham or fraudulent transactions." S. Rep., supra, at 209 n.47, 1984 U.S. Code Cong. & Admin. News at 3392 n.47. The same Senate Report states that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions." S. Rep., supra, at 200-01, 1984 U.S. Code Cong. & Admin. News at 3384. A Senate report declaring the "purpose" of a legislative provision and directing how it "is to be construed" should not casually be interpreted to authorize greater mischief than required by the purpose. This is even truer when the House report declares what is not "intended"--interference with Sixth Amendment rights. Hence, the legislative history plainly supports our view.

In any event, the legislative history fails to demonstrate a "clear expression of an affirmative intention of Congress," Catholic Bishop, 440 U.S. at 504, to subject bona fide attorneys' fees to forfeiture. The fairest conclusion may be "that Congress simply gave no consideration," id., to the application of these provisions to legitimate as opposed to sham attorneys' fees,* and certainly had no intention of interfering with defendants' Sixth Amendment rights. Indeed, this was conceded even by the Tenth Circuit Court of Appeals in its opinion in Nichols, 841

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*Although the Senate Report cited with approval a pre-1984 amendment case holding that some of a defendant's property was forfeitable even though it was transferred to his attorney prior to conviction, S. Rep., supra, at 200 n.28, 1984 U.S. Code Cong. & Admin. News at 3383 n.28 (citing United States v. Long, 654 F.2d 911 (3d Cir. 1981)), "the facts in this case suggest that the transfer was part of a sham." Note, Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys, 62 Notre Dame L. Rev. 734, 741 n.72 (1987).

F.2d at 1496 n.6, which rejected the contention that the statutes should be construed not to cover legitimate attorneys' fees. After an independent "review" of the hearings and the rest of the legislative history, the court could find "only a few oblique references to payments of attorneys," and concluded that "[n]one of these passages indicates that Congress specifically considered whether payments made to attorneys should be subject to forfeiture." Id.* To avoid

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*Where the majority of the panel went wrong in Nichols was in failing to recognize the natural reconciliation between the Government's interest in bringing about forfeiture and the defendant's interest in having the property go to a defense lawyer. (See Point I. D, supra.) In addition, the majority turned logic upside down when it read the Victims of Crime Act of 1984 (now codified at 18 U.S.C. § 3681) to support an inference that when Congress wanted to exempt attorneys' fees, it said so explicitly. 841 F.2d at 1496. The act demonstrates that when Congress wanted to authorize forfeiture of property that might be needed for attorneys' fees, it dealt explicitly with the problem. Moreover, the majority overlooked a critical amendment to the final law passed. The proposed bill would have allowed the regulating of crime publicizing

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the difficult Sixth Amendment problems that would otherwise result, the statute should accordingly be construed not to reach legitimate attorneys' fees, but to apply only to those that are sham or fraudulent transfers.

D. The Government's Broad Assertion of Unfettered Prosecutorial Discretion to Interfere with the Attorney-Client Relationship, Impinge on the Right to Counsel of Choice, and Impair the Adversary System Should Be Rejected as Ultra Vires the Statute

Whatever can be said about the language and the legislative history of the 1984 amendments, it is "clear that Congress

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profits to apply "at any stage of the criminal proceedings" 130 Cong. Rec. S10,542 (daily ed. Aug. 10, 1984). The statute as passed two months and two days later applied only "after conviction," 18 U.S.C. § 3681(a); see id., § 3681(c)(1)(B)(ii)--thus manifesting a clear Congressional intent to avoid interfering with Sixth Amendment rights.

did not consider the potential impact that the new forfeiture provisions would have upon attorneys . . . ." Committee on Criminal Advocacy, The Forfeiture of Attorneys' Fees in Criminal Cases: A Call for Immediate Remedial Action, 41 The Record of the Association of the Bar of the City of New York 469, 477 (1986). Plainly, there is no indication that Congress in any way intended to cede to the prosecutor the extraordinary authority to eliminate chosen defense counsel and profoundly alter the adversary system by the simple expedient of adding forfeiture claims to its prosecutorial assault.

Forfeiture of attorneys' fees represents a grave threat to our adversary system of justice. Cloud, Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights, 1987 Wis. L. Rev., 1, 56; Note, Against Forfeiture of

Attorneys' Fees Under RICO: Protecting the Constitutional Right of Criminal Defendants, 61 N.Y.U. L. Rev. 124 (1986). The unfettered discretion asserted for prosecutors under the Government's interpretation of the statute creates a serious potential for prosecutorial abuse:

> Because almost any indictment that charges felony violation of federal law can be transformed into a RICO indictment, the government can gain the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses merely by appending a forfeiture indictment." The defendant who had already retained counsel would risk losing her upon disclosure that the prosecution intended to seek forfeiture of attorneys' fees; if the defendant had yet to retain counsel, the prosecutor would have the tools to make it extremely difficult for him to do so. In short, the government would have the power both to prevent a particular attorney from representing a given defendant, and to prevent a defendant from retaining any private counsel at all . . . .

Note, 61 N.Y.U. L. Rev., supra, at 147-48 (footnotes omitted). See also Note,

Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?, 39 Stan. L. Rev. 663 (1987); Committee on Criminal Advocacy, supra, at 484 ("if the government wishes to exclude a lawyer from a particular case, it need only allege a RICO violation, add a forfeiture section to the indictment, and then inform the defendant's lawyer that it will seek forfeiture of his legal fees in the event of a conviction. Such unfettered power would strike at the heart of the adversary system."); Thier, 801 F.2d at 1476 (Rubin, J., concurring) ("The tool of the restraining order, thus put into the hands of the prosecution, gives the Government power to exclude vigorous and specialized defense counsel.").

Under the construction of the forfeiture statute urged by the Government, the prosecutor would enjoy awesome power to

affect the balance between the accused and the Sovereign in the criminal process. See Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser"); Cloud, 1987 Wis. L. Rev., supra. The unfettered power to disqualify the defendant's selected champion and render unavailable representation by any private counsel, relegating the defendant to an attorney selected, trained, supervised, and paid for by the very government that seeks to deprive him of his liberty, cuts strongly against the grain of our adversary system and our basic concepts of fairness. To lodge such unfettered power in the hands of any governmental authority would raise troubling questions. When such wide power to tamper with the adversary process is placed in the hands of one of the adversaries in the contest--the prosecutor--the resulting potential for abuse is simply too

great. Cf. Tumey v. Ohio, 273 U.S. 510 (1927) (pecuniary interest of judge in outcome of proceedings results in per se bias reversible even without a showing that the bias affected the judge's conduct). The actual abuse is even greater, of course, when the legislation is applied across the board rather than selectively. Then it knocks retained counsel out of as many cases as possible, severely undermines the private defense bar and catastrophically overloads the public defender system.

The legislative history discussed above demonstrates that Congress never intended to arm prosecutors with such a lethal weapon.* In reality, Congress just

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*We also doubt that the bfp exemption was actually designed to protect against forfeiture of attorneys' fees, although it may have this effect. This provision purports to operate only after the trial is over. 18 U.S.C. § 1963(i); 21 U.S.C. 853(k). But payment of attorneys' fees is an exceptional kind of transfer which arises out of the necessity to defend and which must ordinarily be resolved prior to trial.

adopted some procedural reforms of forfeiture law recommended by the Department of Justice, part of the massive Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1837, passed on October 12, 1984, and adjourned for the fall elections. Subsequent legislative history also demonstrates that Congress did not intend to authorize the Department of Justice to interfere with Sixth Amendment rights. See Brief for Respondent (Peter Monsanto) in Case No. 88-454; Brief Amicus Curiae of the American Bar Association in Support of the Peitioner Caplin & Drysdale in No. 87-1729 and the Respondent Monsanto in No. 88-454, at p. 10. Thus, we must ask whether this general legislative language can support such a broad assertion of prosecutorial discretion, impinging so heavily on individual liberties and altering so dramatically the nature of our adversary system?

Substantial precedent prohibits

reading general statutory language as delegating dangerous power to infringe upon fundamental rights. Courts have demanded an explicit legislative expression of the intention to delegate such authority. E.g., Thompson v. Oklahoma, 487 U.S. ---, ---, 108 S. Ct. 2687, 2706, 101 L.Ed. 2d 702, 728 (1988) (O'Connor, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308-09 (1973) (opinion of Powell, J.); Hampton v. Mow Sun Wong, 426 U.S. 88, 105-14 (1976); Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116, 129 (1958); see J. Freedman, Crisis and Legitimacy 83-85 (1978); B. Schwartz, Administrative Law 47-48 (1976); L. Tribe, American Constitutional Law § 517, at 365-66 (2d ed. 1988); A. Bickel, The Least Dangerous Branch 111-98 (1962); Tribe, The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of

Lawmaking, 10 Creighton L. Rev. 433, 442-43 (1977).

The Brief for the Respondent (Monsanto) in Case No. 88-454 discusses a leading case, Kent v. Dulles, and we agree that the decision there provides a good analogy here. We also agree that the Fourth Circuit majority below in Case No. 87-1729, In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 648-49 (4th Cir. 1988) (en banc), simply overlooked that the serious problems it saw in the CFA should be solved by holding the application of that legislation to legitimate attorneys' fees to be ultra vires. Then Congress would have the opportunity in the first instance to resolve the profound questions of public policy raised by the Executive Branch's assumption of the authority at issue in these cases. A judicial "remand" to the legislature may be the answer.*

*We, as amici curiae, also share the view

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CONCLUSION

Let us conclude this long brief in short epilogue.

We, the People, cherish the right to counsel and the primary right to choose our own counsel. We disfavor, even eschew, forfeitures. The latter is now encroaching on the former. If the Government's blind expansion of a legal fiction is not stopped, the result will be to take the adversary out of the adversary process. The Sixth Amendment is at stake.

We ask this Court to hold strong for

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that the problems cannot be solved by devising some sort of preliminary mini-trial to determine, for practical purposes, the issues which are only supposed to be decided after a full Sixth Amendment jury trial. See Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae in Support of Respondent (Monsanto), in Case No. 88-454, at pp. 22-23. See also United States v. Monsanto, 836 F.2d 74, 86-87 (2d Cir. 1987) (Oakes, J., dissenting), rev'd, 852 F.2d 1400 (2d Cir. 1988) (en banc). Indeed, we see these cases as governed by substantive Sixth Amendment protection of the right to counsel of choice, for which there is no procedural due process "fix."

Freedom, and affirm the Monsanto court below in its holding that genuine attorneys' fees are exempt from forfeiture under the CFA. And, the Court should reverse the en banc decision in Caplin & Drysdale and reinstate the district court decision allowing reasonable attorneys' fees for legitimate legal services rendered.

Respectfully submitted,

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